Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

KRISTOPHER COURTNEY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A COURT IN DENYING A MOTION TO SUPPRESS CAN LITERALLY REJECT THE OFFICER'S CONCLUSION THAT THE MOTORIST, WHO HE DECIDED NOT TO TICKET, WAS NOT, IN HIS JUDGMENT, IMPAIRED AND FREE TO LEAVE, AND SUBSTITUTE THE COURT'S OWN OPINION THAT THERE WAS SOMETHING IMPAIRED ABOUT THE MOTORIST'S JUDGMENT, AND THUS HIS FURTHER DETENTION AND QUESTIONING WAS NOT ILLEGAL.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Kristopher Courtney, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ohio Court of Appeals for the Eighth Judicial District, originally journalized in this case on **August 29, 2005**, and made final by order of the Ohio Supreme Court on **January 25, 2006**, when that Court denied further Appellate review.

OPINIONS BELOW

The Opinion of the Court of Appeals, affirming these convictions, is included in the *Appendix* as **Appendix "A"**. The Order of the Ohio Supreme Court is designated as **Appendix "B"**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment by the Court of Appeals was finalized on **January 25, 2006**, when the Ohio Supreme Court denied further Appellate review. So postured, the jurisdiction of this Court is invoked under **Title 28 U.S.C. 1257 (3).**

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions of the United States Constitution involved in this case are the search and seizure clause of the Fourth Amendment and the self-incriminating clause of the Fifth Amendment. The pertinent text of these reads as follows:

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

> "No person ... shall be compelled in any criminal case to be a witness against himself...."

Amendment VI:

> "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State an district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The pertinent provisions of the **Ohio Rules of Criminal Procedure**, provides:

> **Rule 12(C)(3)**, which states: "Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial: . . . (3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the grounds that it was illegally obtained. Such motions shall be filed in the trial court only."
>
> **Rule 12(F)**, which states: "The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means."

The relevant statute herein, **Revised Code of Ohio, §2923.12** provides in pertinent part that:

> (A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:
>
> (1) A deadly weapon other than a handgun; . . .

STATEMENT OF THE CASE

Kristopher Courtney, the Petitioner, was arrested by two Shaker Heights, Ohio policemen. These officers admitted the search of his car occurred *after* he refused to give them his consent. The appeal to the Ohio Court of Appeals was lodged

in the wake of a reservation of the right to appeal the denial of a Motion to Suppress.

The facts show Officer Kerr, of the Shaker Heights Police Department, testified that he approached the Petitioner, whose car had stopped for a traffic signal, which according to the officer he was not required to stop for (**tr[1]., pp. 7-8**). Continuing, the witness testified:

> Q: So what happens next?
>
> A: We have a conversation about why he's stopped in the middle of the intersection. He said . . . he wanted to make sure he was following all the traffic laws, so that he didn't get stopped by the Shaker Heights police. I told him that I appreciated his efforts to do the right thing and stop at the red light, but that he was in violation. **And I told him that I was going to cut him a break on the red light ticket and let him go at that point**.
>
> Q: Now, doing what you've described, is that within your discretion as a police officer?
>
> A: Yes.

---

[1] The reference **Tr., p. _____**, is to the "Transcript of Proceeding" before the Cuyahoga County Common Pleas Court. This Transcript provided the trial Record centralized in the reviews had in the Court of Appeals and the Ohio Supreme Court.

Q: He was otherwise being cooperative with you?

A: Yes, he was very cooperative.

Q: So what happens next?

A: Patrolman Adkins rolls up to assist me on the traffic stop and I give Mr. Courtney his driver's license back and **I proceed to ask him if he has any drugs or guns or anything else illegal in the car**.

Q: Okay.

A: And he - - **when I asked him that question, he looks away from me, looks down, and says, "*No*."** . . .

Id., pp. 17-18. (Emphasis supplied.) Given this "**no**," the officer then testified that in his experience when people react a certain way to being asked if they will consent to a search, "it shows deception to . . . [him], which raises [in his mind] suspicion." **Id., p. 19**. Next, this officer says he then asked the other officer, who had arrived by then, to help him with this *traffic offense*, and "if he could smell anything coming out of the car." And, of course, it was said that he did (**id., p. 19**).

The Record shows the Petitioner was next forced out of his car at gun point. When the car was searched a gun was found in the car "under the driver's seat" (**id., p. 23**). Significant here, on cross-examination this officer provided the following, additional, critically important testimony:

Q: But you gave him back his license and **told him you were going to give him a break, and that meant he was free to go**?

A: **That's correct**.

Q: But then the other officer came along and the two of you decided to expand this stop into an investigation?

A: No.

Q: Well, you indicated that you asked him questions about whether or not he would consent to the search of his car.

A: Uh-huh.

Tr., pp. 26-27. (Emphasis supplied.)

Next, it should be noted that a highly significant, confirmatory, version of this factual pattern emerges from the officer's pointed responses to questions put to him by the Judge:

THE COURT: Yes. **What then caused you to say, well, you're going to let him go**?

THE WITNESS: He didn't act - - he was very cooperative. He wasn't slurring his speech. He . . . **just didn't act like he was intoxicated to me. He didn't seem like there**

was anything that would prohibit him from driving correctly.[2] And then his explanation of coming from Lomond onto Chagrin and saw the red light there and, you know, he didn't want to get stopped by the police, so he stopped at the red light. . . .

THE COURT: Even though its not a red light for you?

THE WITNESS: Yes. I appreciated that. So I'm going to - - I'll cut you a break.

THE COURT: **Then you're about to let him go**?

THE WITNESS: **Right**.

THE COURT: **And your partner - - your colleague comes up**?

THE WITNESS: **Uh-huh**.

THE COURT: And **then** as you're returning the driver's

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[2]As shown below (***post*, pp. 15-17**), the Court mockingly said and this shows he simply disagreed with the officer's assessments, he would have believed Petitioner was impaired.

> license **you ask him as to whether he's got anything illegal in the car**?
>
> THE WITNESS: **Correct**.

Id., pp. 32-34. (Emphasis supplied.) Next, as far as counsel is concerned this additional segment of the officer's testimony really tells it all. Here, he was asked by Petitioner's counsel:

> Q: The bottom line is, after having talked to him and after listening to his explanation that he stopped for a red light which was visible in front of him, **you made the decision you were going to let him go, right**?
>
> A: **That's correct**.
>
> Q: And so that's a decision based on the fact that **you were convinced that his driving was not impaired and that he would be all right**?
>
> A: **Right**.
>
> Q: But then it changed when you started talking about searching the car?
>
> A: The course did not change.
>
> Q: Well, the course of action changed.
>
> A: No. If he wanted to drive away he could drive away. He had his license. He had

his insurance card back. Everything was good to go. **If he wanted to drive away, he could drive away west down Chagrin.**

Q: **Did you tell him that?**

A: I gave him his license back. I said "I'm going to cut you a break."

Q: **But he didn't drive away, because you continued to talk to him?**

A: **Yeah.**[3] **I can talk to people.**

Q: In other words, you continued to investigate something other than the driving?

A: **I wasn't investigating**[4] **anything. I just asked him for consent to search his car.**

Id., pp. 36-37. (Emphasis supplied.)

---

[3] This response is itself compellingly significant because it compelling agrees that Courtney obviously believed "because . . .[the officer] continued to talk to him he was not free to leave."

[4] If the officer's desire to search was not understood by him to be an investigative technique, someone should tell him its proper label is called a "fishing expedition." See, *e.g.*, **United States v. Wellman, 185 F 3d 651 (6th Cir. 1999).**

II

In support of the Motion to Suppress, Kristopher Courtney, our Petitioner testified that after being accosted by the officer this happened:

> THE WITNESS: . . . He proceeded to [ask] me for my license and insurance. I gave him my license and insurance. He told me he was going to run my name and if everything checked out okay, he was going to let me go. He ran my name. Everything checked out good. He came back and . . . he proceeded to - -
>
> MR. WILLIS: You can resume to your seat.
>
> THE WITNESS: **After he gave me my license and insurance, he asked me do I mind if he search my car.**
>
> And I asked him, "**Why, do you want to search my car?**"
>
> And then he said, "I just want to search the car."

So I said, "No. I know my rights." I said, "If I haven't done anything, what reason do you have to search my car?"

He said, "Why you acting nervous and all that?"

So we went back and forth for about 30 seconds to a minute in as to, "why you want to search my car?" Or, "What's wrong with me? Why you want to search my car?" **So I think that might have been a stall movement for his partner to come up**. Because me and him was cooperating. We was talking to each other like there wasn't a problem. I was cooperating with him and he seemed to be cooperating with me. But **it seemed like he was trying to hold me there for a little bit**. **Then once his partner got there -- I mean, his partner came straight up and then he drew his gun, like, "Get out the car."**

I'm like, "For what?" I let my windows up. I locked my doors.

* * *

I put both hands through the window so they could see. Then,

> at the point they told me, "Put the window down or we going to break the window." So I started getting a little nervous. I seen they was getting a little jittery and I didn't want them to shoot me or nothing. So I let the window down a little bit more and put my arms out and **they both yanked me out the car and proceeded to do everything they did to me**.

Id., pp. 57-59. (Emphasis supplied.) Also, one thing any careful reader gets from the Petitioner's testimony, which is clearly indisputable, is the fact that he was indeed fully aware of his rights and he made the officers aware this was so. Significant here, after being asked could they search his car, his testimony was that he asked them: "am I under arrest?"[5] **(Tr., p. 66.)** Undeniably, this was the right question to ask. In any event, he responded to their request to search by saying that they could not do this. Further, his testimony even shows that he questioned why they even wanted to do this. And, he reiterated the fact that "[he] had [his] license and insurance" **(ibid)**, which was all that was required of him.

Also consider the following additional segment of Kristopher Courtney's testimony. It was given during the prosecutor's cross-examination. This testimony as well is

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[5] This answer shows he understood one of the critical issues here, *i.e.*, the officers could only make a warrantless search of his car under these circumstances if they had probable cause to arrest him and did so, or he consented and he knew he did not have to do this - - and he did not do so.

fully verified by segments of the officer's testimony. Here, it should be recalled, Mr. Courtney responded "no" when asked by the officer if he would consent to a search (**tr., p. 18**). (***Ante*, p. 2.**) Indeed, not unlike Officer Kerr's testimony, Courtney testified in response to questions put to him by the Judge:

> A: . . . I gave him licence and insurance and he proceeded to go back a little bit, to go do whatever he had to do. When he came back to my window I was under the assumption that everything was okay, because I asked him.
>
> Q: And it was all right?
>
> A: At that point.
>
> Q: And he gave you your licence, correct?
>
> A: Yes.
>
> Q: And he gave you your insurance papers, right?
>
> A: Yes.
>
> Q: And **he said**, "I'm cutting you a break. **I'm not going to give you a ticket**"?
>
> A: **No. I asked him, "Could I go?" right then.**
>
> Q: Okay?

A: **He said, "No. I just want to ask a question. Can I search your car?"**

And I said, "No."

Q: Hold on. Let me back up. Because he gives you your license and gives you your insurance papers and then he says words to the effect of, "I'm cutting you a break. I'm not going to give you a ticket," right?

A: He said that before.

Q: Okay.

A: But after he came back and everything checked out, now it was like something else. I guess he wasn't expecting my license and insurance to be valid and clean. Because once that checked out valid and clean, he came back with, "Can I search your car?"

And, I asked him, "Where did that come from if everything checks out all right?"

Q: So you're figuring that he's looking to pimp you, that he's looking to jam you up; that he figures, you know, your license is going to be - - that probably there's some warrant for you, right? And when that checks out okay, now he's going to be pissed off and he's going to try to find something else to stick on you; is that where we're going with this?

A: I don't know if he was pissed off. But, I guess he chose to dig a little further, because he did ask.

Q: Was he in any way disrespectful to you up to that point in time?

A: Not up until that point, no.

Q: And you started going - -

A: No. I told him "no" immediately. Then he asked again, proceeded to continue. Like the officer said, he didn't tell me that I wasn't under arrest at the time. He didn't say that I could have pulled down Chagrin and went westbound. He had me stopped right there. *I asked him, "Could I go?"*

He said, "No."

If I would have pulled off on . . . him while he was talking, then I knew that was going to be a serious situation. ***I wasn't free to go. He was still questioning me.***

Id., pp. 67-69. (Emphasis supplied.)

Significant here, the Record shows, that despite the testimony of the officer, originally he was investigating a traffic offense, for which he could have issued a ticket (***ante*, p. 3**), and the Defendant's own testimony which shows his concerns and an awareness of his rights (**id., pp. 9-10**), the Court saw all this differently. Here, the Record shows:

THE COURT: Well, let me say that, to me, there's no stop here. **There was no traffic stop**. The defendant was already stopped. **The officer didn't come up to him to issue him a citation**[6]. The officer came up to him because he couldn't figure out why at 2:30 in the morning this automobile was stopped in the middle of the interaction blocking traffic which would move out at Farnsleigh.

* * *

So this isn't a traffic stop to cite somebody for something. This is an officer trying to figure out, "Why is this guy stopped there like this?" And then this guy gives this explanation, which is a completely batty explanation that he was making a left-hand turn . . . onto Chagrin, and he thought he had to stop. **To me, if I was him, I'd say**

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[6] Of course, this is not what the officer said in his testimony. His testimony was that the Appellant was getting "a break on the red light ticket" (***ante*, p. 2**).

***there's* something impaired about this man's judgment.**[7]

And it would cause me to think even more that he's under the influence. And he smells a little bit of marijuana. I think this is a whole issue, Mr. Willis, of the officer not stopping him at all, but finding somebody in a strange position on a street **and wondering whether this guy is impaired in some way.**

* * *

. . . it was clear that he wouldn't given him consent. But the officer, I don't think, Mr. Willis, has to abandon his concern that there's something wrong with this guy.

And maybe he shouldn't be on the road. And then when he rolls up the window and locks the doors, yeah, I mean, I think that's a very peculiar kind of thing. So I think

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[7] Here again the Court simply ignored the officer's testimony. The officer's categorical testimony was that ". . . he didn't seem like there was anything that would prohibit him from driving correctly **(tr., pp. 36-37)**. The quoted statement was made in response to a question asked by the Court. This fact, simply put is truly impervious to the trial Court making a contrary finding and then relying on it as he did.

> his actions led - - understandably led the police to believe that this guy was impaired, as the officer has testified, **and then wanted to search at this point to find out what was going on. So I'm going to the deny the motion to suppress**.

Id., pp. 79-82. (Emphasis supplied.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Here, the law is clear, the State (given the search here involved was indeed a warrantless one), had the burden of proving one of the exceptions to the warrant requirement was present. See **United States v. Jeffers, 342 U.S. 48, at 51 (1951)** and **McDonald v. United States, 335 U.S. 451, at 456 (1948)**. Of critical significance to this Petition is the fact that the trial Judge actually articulated the following determinations:

1. That there is nothing wrong with the Petitioner refusing to let them search his car; and

2. There is nothing wrong with "the officer . . .[becoming] suspicious[8] when he wouldn't let them search the car." **(Id., p. 61.)**

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[8]Assuming there is nothing wrong with an officer becoming suspicious when one refuses to allow them to search, it is wrong to equate suspicion to probable cause and act on that basis.

Distilled, it is indeed significant that the Court found Kristopher Courtney did, in fact, deny the officer permission to search the car (**id., pp. 81-82**). So postured, what further emerges from this insuperable finding, is the idea that, in the Court's view, what happened *after* our Petitioner should have been allowed to leave, created a sufficient reason for the officer to delay his departure and thus enabled the officer to make the attempt to inveigle him, if he could, into consenting to a search. Next, the Court is saying that by the Petitioner refusing to let them search, this is what "led the police to *suddenly* believe . . . [he] was impaired[9] . . . And [it was] then [they justifiably] wanted to search . . . to find out what was going on" (**id., p. 82**). (*Emphasis supplied.*) Indeed, given this convoluted thesis was actually articulated by the Judge as his sole reason for denying the Motion to Suppress, really makes us wonder how the courts below could possibly approve this search, Courtney's conviction and a sentence to the penitentiary.

Now, one thing seems most clear from a reading of certain indisputable facts in this Record. Indeed, it was a very wise man who once wrote that the mere need to investigate and solve crimes does not allow the law to place its own enforcement above other values. So postured in this case, it could not be any clearer that the officer's testimony that he "wasn't investigating" anything and he simply wanted to search the Defendant's car (***ante*, p. 6**), literally proves a point that simply cannot, or at least should not, be avoided. Simply put, anything that happened in this case *after* Kristopher Courtney was given back his papers, and should have been allowed to leave - - when he asked for permission

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[9] Of course, nowhere in the Record was it said that the officers "believed . . . [Petitioner] was impaired," as the Court found.

to do so (***ante*, pp. 9-10**), must be viewed as non-consensual. Indeed, when the officer embarked on his effort to get him to consent to a search of the car, a request that was punctuated by the arrival of another zone car officer[10] (***ante*, p. 4**), a second seizure or an arrest must be viewed as having then occurred at that point.

Simply put then, at the heart of the contentions here made, is a very cogent tenet. It holds that any additional questioning that goes beyond the original purpose of the stop; here the traffic stop, must be supported by additional facts that make for reasonable suspicion. See **United States v. Wellman, 185 F 3d 651 (6th Cir. 1999)**, where it was held:

> A traffic stop is analogous to a *Terry* stop in that following the initial stop, the subsequent detention cannot be excessively intrusive and must be reasonably related in time to **the investigation**.

Id, p. 656. (Emphasis supplied.) Also see, **United States v. Hill, 195 F 3d 258, at 264 (6th Cir. 1999)**. The upshot of these points is that they show a driver must be permitted to proceed after a routine traffic stop if his papers reveal no reason for detention. This is so unless the officer has reasonable articulable suspicion of some criminal activity or the driver consents to being questioned. The point thus made here is magnified by the fact that *if* "a consensual encounter is simply a voluntary cooperation of a private citizen in response to non-coercive questions by a law enforcement

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[10] The fact that this precise point was made in the wake of questions asked by the Judge is quite significant (**tr., pp. 33-34**). Also see ***ante*, p. 4**.

officer" (**United States v. Patton, 183 F. 3d 1190, at 1194 (10th Cir. 1999)**, then clearly this was not such an encounter.

At the outset, it seems clear that the critical questions here turn on (1) whether Kristopher Courtney, was free to leave *after* the officer told him he was giving him a break on the traffic offense and returned to him his driver's credentials, as the officer testified was the case (**tr., p. 5**). Or (2) was he still being restrained, *i.e.*, still under seizure, as was testified to as well (**tr., pp. 67-69**)? Here, certain facts are clear. When this officer "accosted" our Petitioner and requested his driving credentials he was (at that point) indeed, and absolutely, restrained of his liberty and it is equally clear that in our judgment the officer's actions amounted to a impermissible seizure. **Terry v. Ohio, 392 U.S. 1 (1968)**.

Likewise significant here, is that it was in **United States v. Mendenhall, 446 U.S. 554 (1980)**, that the **Terry** seizure standard, as espoused therein, established the test for determining when and whether a restraint was in place. There, it was said that a seizure occurs: ". . . if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave" (**id., pp. 553-554**). Here, the facts show indeed beyond cavil that immediately *after* returning the Petitioner his credentials two things happened. One, the officer asked him to consent to a search of his car, this occurred *after* another officer, by then, had joined them at the scene. (**Tr., pp. 26-27.**) The fact that this happened not only belies the officer's testimony that Kristopher Courtney was free to leave with no risk of being shot (**id., pp. 36-37**), it also adds critical weight to Courtney's own testimony that he was not about to drive off as, and after, the officer asked him for permission to search, and risk being shot (**id., p. 69**). And secondly, this scenario likewise adds critical weight to the further contention here

made that the officers contrived the testimony that all of a *sudden* they smelled burnt marijuana in the car. And, it was this fact that gave them probable cause to search for the source of this asserted effluvium. The fact that no burnt marijuana was said to have been located in the care after it was fully searched, is, of course, something that is not easily ignored.

Indeed, it should be noted, when specifically asked if they found any evidence the accused had been smoking marijuana in his car, it can be said the officer truly copped out. He did not recall if they did. **(Id., p. 25.)** This latter answer becomes all the more significant in the light of the officer's earlier testimony given in the wake of the prosecutor's question that asked him point blank if they found "**anything** else in the car." **(Id., p. 24.)** (Emphasis supplied.)

In resolving the Motion the Court fully and aptly credited the officer's testimony (as shown above), that "after having talked to . . . [the Petitioner] and listening to his explanation . . . [he, the officer] made the decision" to let him go, and that he did this because he was convinced that "his driving was not impaired and that he would be alright" (***ante*, p. 5**). (Also see ***ante*, pp. 3-4.**) Why this finding was not deemed a major premise for the dispositive conclusion here truly is quite troubling and should be reckoned with.

ARGUMENT NO. I:

THE COURT'S DENIAL OF A MOTION TO SUPPRESS, IN WHICH IT SUBSTITUTED HIS ASSESSMENT OF THE "FACTS" FOR THOSE OF THE ARRESTING OFFICER, CANNOT SURVIVE MEANINGFUL SCRUTINY.

(A)

Where, as Here, a Motion to Suppress Is Considered, the State Bears the Burden of Proof When it is Shown That the Officers Had Acted Without a Warrant.

In denying the Petitioner's Motion to Suppress, it seems clear enough the Court ignored (from our perspective) critical segments of the officer's testimony. This unequivocal testimony which clearly showed he actually made a decision not to issue a traffic citation for the "*traffic* violation" that had generated his contact with the Appellant in the first place - - a "red light ticket" (**tr., pp. 17-18**). Indeed, the Record shows it appears the Petitioner was at the very least confused as to whether he had the light and therefore he stopped. (**Tr., pp. 16-18**.) The officer fully concedes (as shown elsewhere [***ante*, p. 5**]), that he made the decision not to issue the ticket. (See **tr., p. 26**.) Indeed, as precisely put by the officer, Mr. Courtney was free to go. (**Ibid.**) To be sure then, the fact that this officer gave these answers to questions put to him by the prosecutor magnifies the impact of the officer's testimony.

Clearly, as we see it, the following segment of testimony rendered by the primary officer in this case really puts this case in a proper prospective. Here the Record shows:

Q: The bottom line is, after having talked to him and after listening to his explanation that he stopped for a light which was visible in front of him, you made the decision you were going to let him go, right?

A: That's correct.

Q: And so that's a decision based on the fact that you were convinced that his driving was not impaired and that he would be alright?

A: Right.

Tr., p. 36. So postured, the conclusion has to be made that an arrest or a seizure (both of which required probable cause) occurred here *before* the search of the car was made. Indeed, the law is clear: if a reasonable person in the situation Kristopher Courtney found himself in, would have believed he was not free to leave, an arrest or a seizure must be said to have occurred.

(B)

Where After the Officer Indicates to a Motorist, Encountered in Connection With a Minor Traffic Offense, All Aspects of That Phase of the Officer's Investigation Were Over, Any Further Detention of the Motorist, Amounts to a Seizure and Must be Justified in Accordance with Fundamental Criteria.

Here, the law is clear that under the Fourth Amendment there are only three types of permissible encounters that can take place between a police officer and a citizen - - when the officer lacks a warrant. First we have consensual encounters initiated by the officer without any articulable reason and the citizen is briefly asked questions and he agrees to answer these questions. Next, we have the **Terry** stop, which is an involuntary detention, which must, in all instances, be predicated on and justified by reasonable suspicion. See **Terry v. Ohio, 392 U.S. 1 (1968)**. Then we have a seizure or an arrest, both of which require probable cause. Cf., **State v. Washington, 144 Ohio App. 3d. 482 (8th Dist. 2001)**.

Indeed, while the principles involved here have been variously stated, what distills from the cases is that a seizure occurs when, under the totality of circumstances, a reasonable person would have believed he or she was not free to walk away - - or drive away. So postured, the apt question here, simply put, asks: is there anything in this case that would make us think that a reasonable person in Kristopher Courtney's situation would have felt that he was free to terminate the encounter with this first officer, who had been joined by a second officer, and simply drive away although he was being asked to consent to a search of his car?

The law is, of course, most clear. Given the officers were required to justify any detention of the Petitioner after they say he was free to leave (***ante*, p. 5**), it follows that his refusal to consent to a search of his car could not be used by the officers as support for the requisite reasonable, articulable suspicion needed to justify their further detention of him. See **Florida v. Royer, 460 U.S. 491, at 491 (1983)**. Also see **United States v. Wilson, 953 F. 2d 116 (4th Cir. 1991)**.

For our part, the metaphysical acumen that would be capable of being read into this scenario the idea that no seizure occurred before these officers made the effort to obtain consent would be too abstract to be of any practical worth. No other interpretation can be put on these facts. Indeed, Petitioner's testimony that if he had tried to drive off while the officer's were talking to him "that was going to be a serious situation" (***ante*, p. 10**) is really beyond dispute.

(C)

After the Purpose for Which a Traffic Stop Was Made Is Satisfied, Any Further Detention of the Motorist must Be Justified by Facts Independent of Those Related to the Original Stop.

For our part, one does not have to be a legal scholar to fully recognize, as this Court surely will, that there is a difference between a valid investigative stop (or seizure of the type which traffic stops are viewed as being within the ambit of **Terry**) for which reasonable suspicion is enough *and* any detention that amounts to an arrest (or a seizure) for which probable cause is required. Obviously, the difference is one of extent and there is a clear line of demarcation between the two. Indeed, the one thing that is most clear is that an

investigative purpose cannot be used as the basis to conduct a full-fledged search. To conduct such a search probable cause is required.

Here, of course, the facts are clear. In the officer's own words, after making it clear to the motorist he would not be issuing a ticket, and after returning to him his papers he then asked permission to search the car. He says he was denied permission to do so. And when asked if he was then investigating something other than the driving his answer really says it all. What he precisely stated was that he was **not** "investigating anything" and that he "just asked him to consent to search his car" (***ante*, p. 6**). Clearly then the officer's own testimony shows that he lacked probable cause. Indeed, the request for consent standing alone makes that point for us. This follows because where probable cause exists, consent is not required. Any reasonably well-trained officer would know this.

Now, no one denies that on review the Court should accord deferential consideration to findings of fact made by the trial Judge. But, when such findings are clearly erroneous, the case here, they must be rejected. Indeed, this point is well made when one reckons with the officer's testimony that he regarded the stop as a traffic encounter[11] (***ante*, p. 2**) and that he was fully satisfied himself that the driver did not appear to him to be impaired and for that reason he opted not to further detain him (***ante*, pp. 4-5**). Yet, we have the trial Court vetoing his testimony and in lieu thereof artificially attributing to the officer other reasons for the stop. Indeed, the Court even creates for the officer

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[11] Specifically, the officer testified: "I told him I would cut him a break on the red light ticket . . ." (***ante*, p. 2**).

reasons for the actions taken by him. Given the officer did not provide a testimonial basis on the Court's thesis,[12] clearly then the Court's thesis cannot be defended. This is so not simply because it is no more the trial Court's role, in these circumstances, to create evidence and impute it to the witnesses, than it is for him to totally ignore compelling testimony contrary to the Court's thesis and ignore the fact that the State must also view, as having waived, the Court's nonsensical thesis - - which at best is indefensible.

(D)

If a Reasonable Person Would Not Have Believed He Was Free to Leave and Not Submit to Further Detention a Seizure Must be Deemed to Have Occurred.

The State is, of course, required to argue that after the officer returned the Petitioner's driving credentials, although he did not tell him he was free to leave (and despite testimony by Petitioner that he asked could he leave **[tr., pp. 9-10]**), this *subsequent* detention was completely consensual. In dealing with these clashing contentions one thing seems clear enough: a reasonable person would not have felt free to leave had a seizure occurred at that point. See **United States v. Mendenhall, 446 U.S. 554 (1980)**.

Here, the a fact to be considered is the threatening presence of two officers, when the request for consent to search was asked and refused. Further, it should be noted that the Court found that Kristopher Courtney refused, as the testimony showed, to consent to a search (***ante*, pp. 11-12**).

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[12] See ***ante*, pp. 4-5 & 10-11**.

(Also see **tr., p. 61**.) This is significant because this finding shows the Petitioner refused to consent to any search *before* the officer stated they smelled the **burnt** marijuana, which was never found - - although we can suppose it was searched for. Also, according to the Petitioner, we have the display of weapons and there is evidence of a tone of voice that indicated compliance, with the officers' request, would be enforced.

CONCLUSION

Of critical significance to the various Fourth Amendment issues in this case, is that the facts are indeed straight forward. First off, one should reckon with the two indisputable facts set forth by the Court. As shown above (***ante*, p. 10**), the Court first recognized and credited the fact that Kristopher Courtney did in fact refuse to give his consent to a search of his car and that in so doing, he did nothing wrong. And the Court told us that he did not "see anything wrong with the officer being suspicious when he [refused to consent to a search]" (**tr., pp. 81-82**).

As a proem to the trial Court's Fourth Amendment analysis, the Court's juxtaposing of these (let's say) premises and regarding them as providing the foundation for his resolution conclusion, based on the facts here, is indeed most troubling. This follows because one cannot ignore the context in which these premises are validated. This point is well made when it is understood that when the officer asked Mr. Courtney for permission to search his car and it was refused, clearly this happened *after* the officer had quelled and fully satisfied all of his concerns relative to the purpose that impelled the officer's original confrontation with the Petitioner. On the other hand, when an officer encounters a person, whatever the reasons, and asks for permission to search, the law is clear enough. If the approach itself can be

defended (either as consensual or on the basis on principles distilled from **Terry**), the officer is actually seeking to quell a belief, whether well founded or not, that criminal activity may be afoot.

Again, we cannot overlook that here the facts show the officer asked for permission to search *after* he first returned the motorist his driving documents. With this being so, it follows that if the question put to Kristopher Courtney would have communicated to a reasonable person that he was not free to ignore these questions and drive off, then Mr. Courtney's actions in not doing so must be viewed as submission to the authority the *officers* demonstrated was present.

To be sure we do agree with the Court that there is nothing wrong with a police officer asking a motorist if he will *voluntarily* consent to the search of his vehicle. On the other hand, one thing is likewise certain. There is nothing suspicious about a motorist refusing to consent to the search of his car. Indeed, an officer's curiosity concerning why a motorist would refuse to consent to a search, or even to talk to the officers, cannot be factored into any suspicious analysis or equation.

Simply put, this follows because the constitutional right to refuse to consent to a search would be of little value if the very fact one chooses to exercise that right could serve as part of the Court's reason for findings that a reasonable suspicion existed that would make any consent to the search unnecessary.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

No. 05-1885

[Filed January 25, 2006]

State of Ohio	)
	)
v.	)
	)
Kristopher Courtney	)
	)

ENTRY

Upon consideration of the juridictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

/s/ _____
THOMAS J. MOYER
Chief Justice

APPENDIX B

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY

NO. 85331

[Filed August 18, 2005]

STATE OF OHIO,
Plaintiff-Appellee

v.

KRISTOPHER COURTNEY,
Defendant-Appellant

On Appeal From
CHARACTER OF PROCEEDING
Criminal appeal from Common Pleas Court
Case No. CR-452981

JUDGES: Patricia Ann Blackmon, Administrative Judge. Frank D. Celebrezze, Jr. J., and Kenneth A. Rocco, J., Concur.

JOURNAL ENTRY and OPINION

PATRICIA ANN BLACKMON, A.J.:

Appellant Kristopher Courtney appeals the trial court's denial of his motion to suppress. On appeal he assigns the following error for our review:

> **"I. The court erred when it denied defendant's motion to suppress."**

Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

On June 9, 2004, the Cuyahoga County Grand Jury indicted Courtney for one count of carrying a concealed weapon and for one count of having a weapon while under a disability. At his arraignment, Courtney pled not guilty to the indictment and subsequently filed a motion to suppress, which the trial court denied.

COURT'S FINDINGS

After receiving testimony at the suppression hearing, the trial court made the following findings:

THE COURT: **Well, let me say that, to me, there's no stop here. There was no traffic stop. The defendant was already stopped. The officer didn't come up to him to issue him a citation. The officer came up to him because he couldn't figure out why at 2:30 in the morning this automobile was stopped in the middle of an**

intersection blocking traffic which would move out at Farnsleigh.

And he's thinking, at 2:30 in the morning with some car stopped there whether - and, frankly, I'm much more inclined to believe the officer. It may be the that [sic] the defendant thinks he saw this police car. But it's also more likely to me that, exactly as the officer said, he had just been coming from something at Warrensville Center and he's on his way down here.

But whether the officer is right about what happened or the defendant is right that the officer was already stopped there, this business of having this car stopped in the middle of this intersection at 2:30 in the morning, I'd be wondering, "What's with this guy? Is he passed out? Is he drunk?" Because it makes no sense to me.

THE COURT: **So this isn't a traffic stop to cite somebody for something. This is an officer trying to figure out, "Why is this guy stopped there like this?" And then this guy gives this explanation, which is a completely batty explanation that he was making a left-hand turn onto Lomond -- I mean, onto Chagrin, and he thought he had to stop. To me, if I was him, I'd say there's something impaired about this man's judgment.**

And it would cause me to think even more that he's under the influence. And he smells a little bit of marijuana. I think this is a whole issue, Mr. Willis, of the officer not stopping him at all, but finding somebody in a strange position on a street and wondering whether this guy is impaired in some way.

And as this thing evolves the evidence begins to emerge here that there is a likelihood of marijuana. But then when the defendant does exercise his rights -- and there's nothing wrong with that -- of saying, 'I don't want to let you search the car," there's also nothing wrong with the officer to be suspicious when he wouldn't let him search the car.

I don't see anything wrong with the officer being suspicious when he says that. And I believe the defendant probably said, "You can't search my car," or at least communicated -- made it clear - whether he used those words or not, it was clear that he wouldn't give him consent. But the officer, I don't think, Mr. Willis, has to abandon his concern that there's something wrong with this guy.

And maybe he shouldn't be on the road. And then when he rolls up the window and locks the doors, yeah, I mean, I think that's a very peculiar kind of

> **thing. So I think his actions led -- understandably led the police to believe that this guy was impaired, as the officer has testified, and then wanted to search at this point to find out what was going on. So I'm going deny [sic] the motion to suppress.**

Upon reviewing the record, we conclude that the judge's findings are supported by competent, credible evidence. The State presented two officers, Kerr and Adkins, who testified that Courtney was stopped in the street. Officer Kerr approached him, took his license, insurance; checked each and found no activity. Officer Kerr planned to let Courtney leave, assuming his license and insurance were in good order.

Before letting Courtney leave, the officer asked Courtney whether he had any drugs, weapons, or anything illegal. Courtney looked away and responded in the negative. The officer then asked whether he could search the vehicle, and Courtney said "No."

Officer Adkins joined Officer Kerr, and Kerr inquired as to whether he smelled marijuana. He said he did. It was at this point that Courtney was ordered out of the car.

Courtney testified, and his testimony did not differ from Officer Kerr, except he said Kerr drew his weapon at the moment that Adkins arrived.

During the search of the car, the officer found a small bag of marijuana and a loaded revolver.

MOTION TO SUPPRESS

In his sole assigned error, Courtney argues the trial court erred in denying his motion to suppress. We disagree.

An appeal of a trial court's ruling on a motion to suppress evidence involves mixed questions of law and fact. Initially, we note that in a hearing on a motion to suppress evidence, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate the credibility of witnesses.[1] Thus, the credibility of witnesses during a suppression hearing is a matter for the trial court. A reviewing court should not disturb the trial court's findings on the issue of credibility.[2] Accordingly, in our review we are bound to accept the trial court's findings of fact whether they are supported by competent, credible evidence.[3]

The Fourth and Fourteenth Amendments to the United States Constitution prohibit any governmental search or seizure, including a brief investigative stop, unless supported

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[1] See *State v. Robinson* (1994), 98 Ohio App.3d 560, 649 N.E.2d 18; *State v. Rossiter* (1993), 88 Ohio App.3d 162, 623 N.E.2d 645; *State v. Lewis* (1992), 78 Ohio App.3d 518, 605 N.E.2d 451; *State v. Warren* (Aug. 12, 1991), 4th Dist. No. 90CA7, 1991 Ohio App. LEXIS 3931.

[2] See *State v. Mills* (1992), 62 Ohio St.3d 357, 582 N.E.2d 972; *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 Ohio B. 57, 437 N.E.2d 583.

[3] See *State v. Harris* (1994), 98 Ohio App.3d 543, 649 N.E.2d 7.

by an objective justification.[4] Section 14, Article I of the Ohio Constitution protects the same interests in a manner consistent with the Fourth Amendment to the United States Constitution.[5]

In *Terry v. Ohio*,[6] the United States Supreme Court held that a police officer may stop and investigate unusual behavior, even without probable cause to arrest, when he reasonably concludes that the individual is engaged in criminal activity. In assessing that conclusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.[7] Furthermore, the standard against which the facts are judged must be an objective one: "Would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[8]

An objective and particularized suspicion that criminal activity was afoot must be based on the entire picture, a

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[4] *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621; *Reid v. Georgia* (1980), 448 U.S. 438, 440, 100 S. Ct. 2752, 65 L. Ed. 2d 890; *Terry v. Ohio* (1968), 392 U.S. 1, 19, 88 S. Ct. 1868, 20 L. Ed. 2d 889.

[5] *State v. Lindway* (1936), 131 Ohio St. 166, 2 N.E.2d 490; *State v. Burkholder* (1984), 12 Ohio St.3d 205, 12 Ohio B. 269, 466 N.E.2d 176.

[6] (1968), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889.

[7] Id. at 21.

[8] Id. at 21-22.

totality of the surrounding circumstances.[9] Furthermore, these circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.[10]

In the instant case, our analysis of the totality of the circumstances begins with the officer's observation of the car stopped in the middle of the intersection at 2:30 in the morning. Officer Kerr testified that when he observed the car stopped in the middle of the intersection, his initial thought was that either something was wrong with the car, or that the driver was intoxicated.[11] Upon approaching the stopped vehicle, he could smell the odor of Black and Mild cigar, and believed he smelled marijuana. In addition, he observed that Courtney's eyes were glassy and bloodshot.

From the initial observation, Officer Kerr had reason to suspect that Courtney might be intoxicated. When Officer Kerr asked Courtney why he was stopped in middle of the intersection, Courtney explained that he had stopped for the red light. The instant red light was for the motorists traveling eastbound or westbound on Chagrin Boulevard; thus, motorists turning westbound onto Chagrin Boulevard [**10] from Lomond are not required to stop. Nevertheless, Officer Kerr made the decision not to issue a citation upon learning whether Courtney's credentials were valid.

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[9] *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489; *United States v. Rickus* (C.A. 3, 1984), 737 F.2d 360, 365.

[10] *United States v. Hall* (C.A. D.C. 1976), 174 U.S. App. D.C. 13, 525 F.2d 857, 859; *State v. Freeman* (1980), 64 Ohio St.2d 291, 295, 414 N.E.2d 1044.

[11] Tr. at 32.

Upon returning Courtney's valid credentials, Officer Kerr could clearly smell the odor of burned marijuana, because the odor of the Black and Mild cigar had dissipated after the car window had been opened during the incident. In addition, Patrolman Adkins was certain that he too smelled the odor of burned marijuana. Consequently, the plain smell of the burned marijuana motivated Officer Kerr to investigate the matter further, by requesting consent to search Courtney's car. Under the circumstances, Officer Kerr's actions were reasonable.

The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause for arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.[12] In this case, the officer requesting permission to search Courtney's car was reasonable because the officer smelled marijuana, observed Courtney's glassy, blood-shot eyes, and observed his vehicle stopped in the street.

The Ohio Supreme Court has held "the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement."[13] Thus, the search of the vehicle was permitted; the trial court correctly denied the motion to suppress and we overrule Courtney's sole assigned error.

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[12] *Adams v. Williams* (1972), 407 U.S. 143, 145, 92 S. Ct. 1921, 32 L. Ed. 2d 612.

[13] *State v. Moore*, 90 Ohio St.3d 47, 2000 Ohio 10, 734 N.E.2d 804.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR. J., and KENNETH A. ROCCO, J., CONCUR.

/s/_____
PATRICIA ANN BLACKMON
ADMINISTRATIVE JUDGE

APPENDIX C

IN THE COURT OF COMMON PLEAS
COUYAHOGA COUNTY, OHIO

NO. CR-04-452981-A

[Filed September 16, 2004]

STATE OF OHIO,	)
Plaintiff	)
	)
v.	)
	)
KRISTOPHER COURTNEY,	)
Defendant	)
	)

Judge: BURT W. GRIFFIN

JOURNAL ENTRY

Defendant in Court with Counsel James R. Willis, Prosecuting Attorney Steve Gall present. Court Reporter present.

Defendant withdraws former plea of not guilty and enters a plea of no contest to count(s) 1, 2.

The Court advises the Defendant of all constitutional rights and penalties and upon the evidence proffered finds the

Defendant guilty of carrying concealed weapons / 2923.12-F4 as charged in Count(s) 1.

The Court advises the Defendant of all constitutional rights and penalties and upon the evidence proffered finds the Defendant guilty of having weapons while under disability / 2923.13-F5 as charged in Count(s) 2.

Defendant addresses the Court.

Prosecutor addresses the Court.

The Court considered all required factors of law.

The Court finds that prison is consistent with the purpose of R.C. 2929.11.

The Court imposes a prison sentence at the Lorain Correctional Institution of 1 year(s). Defendant sentenced to 1 year on each of Counts 1 and 2; Counts to run concurrent with each other.

Post release control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28.

Defendant to receive jail time credit for 3 days, to date.

Appeal bond set at $5,000.00.

Appellate rights explained; appeal bond is a surety bond.

Defendant is to pay Court costs.

/s/_____
Judge Signature

Date: 9/16/04